No. 06-1195

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE *BOUMEDIENE* PETITIONERS

STEPHEN H. OLESKEY
ROBERT C. KIRSCH
MARK C. FLEMING
JOSEPH J. MUELLER
PRATIK A. SHAH
LYNNE CAMPBELL SOUTTER
JEFFREY S. GLEASON
LAUREN G. BRUNSWICK
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
JONATHAN G. CEDARBAUM
MICHAEL J. GOTTLIEB
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 663-6000

DOUGLAS F. CURTIS
PAUL M. WINKE
ANNE K. SMALL
DAVID S. LESSER
JULIAN DAVIS MORTENSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

QUESTIONS PRESENTED

1. Whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, validly stripped federal court jurisdiction over habeas corpus petitions filed by foreign citizens imprisoned indefinitely at the United States Naval Station at Guantanamo Bay.

2. Whether Petitioners' indefinite military imprisonment as "enemy combatants" is unlawful, requiring the grant of habeas relief.

LIST OF PARTIES TO PROCEEDING BELOW

The parties to the proceeding in the court of appeals (*Boumediene, et al.* v. *Bush, et al.*, No. 05-5062) were:

Lakhdar Boumediene, Mustafa Ait Idir, Belkacem Bensayah, Hadj Boudella, Saber Lahmar, and Mohamed Nechla (Appellants);

Abassia Bouadjmi, Sabiha Delic-Ait Idir, Anela Kobilica, Emina Planja, Emina Lahmar, and Badra Baouche (Next Friends of Appellants); and

George W. Bush, Donald Rumsfeld, Jay Hood, and Nelson J. Cannon (Appellees).

This case was consolidated in the court of appeals with *Khalid* v. *Bush, et al.*, No. 05-5063, in which the parties were:

Ridouane Khalid (Appellant) and Mohammed Khalid (Next Friend of Appellant); and

George W. Bush, Donald Rumsfeld, Jay Hood, and Nelson J. Cannon (Appellees).

The court of appeals heard *Boumediene* and *Khalid* at the same time as *Al Odah, et al.* v. *United States, et al.*, Nos. 05-5064, *et al.* This case was not consolidated with *Al Odah*.

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OPINIONS BELOW

The opinion of the district court (Pet. App. 51a-79a) is reported at 355 F. Supp. 2d 311. The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 476 F.3d 981.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on February 20, 2007. The petition for certiorari was filed on March 5, 2007 and granted on June 29, 2007.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Article 1, section 9, clause 2 of the United States Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

2. The Fifth Amendment to the Constitution provides, in relevant part: "[N]or shall any person ... be deprived of life, liberty, or property, without due process of law."

3. The following statutory provisions are set forth in relevant part in the appendix to the petition for certiorari:

a. 28 U.S.C. § 2241(c) (2004) (Pet. App. 85a);

b. Authorization for Use of Military Force, § 2(a), Pub. L. No. 107-40, 115 Stat. 224 (2001) (Pet. App. 85a);

c. Detainee Treatment Act of 2005, § 1005(e)(2), Pub. L. No. 109-148, 119 Stat. 2680 (Pet. App. 85a-87a);

d. Military Commissions Act of 2006, § 7, Pub. L. No. 109-366, 120 Stat. 2600 (Pet. App. 87a-88a).

STATEMENT

A. Petitioners' Arrest, Investigation, And Release

Petitioners are six natives of Algeria who emigrated to Bosnia and Herzegovina during the 1990s. Five acquired Bosnian citizenship, while the sixth (Mr. Lahmar) acquired permanent residency. At the time of the brutal attacks of September 11, 2001, each Petitioner was living peacefully with his family in Bosnia.[1] No Petitioner traveled to Afghani-

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[1] *See, e.g.*, Mem. in Supp. of Mot. for Order Enjoining Appellees from

stan during the time that the United States has been engaged in hostilities there. No Petitioner has waged war or committed belligerent acts against the United States or its allies.

Petitioners were arrested by Bosnian police in October 2001, purportedly on suspicion of plotting to attack the U.S. Embassy in Sarajevo. The Bosnian authorities had no evidence for this charge. Rather, they acted under pressure from U.S. officials, who threatened to cease diplomatic relations with Bosnia if Petitioners were not arrested.[2]

On January 17, 2002, the Supreme Court of the Federation of Bosnia and Herzegovina, acting with the concurrence of the Bosnian prosecutor, ordered Petitioners released because a three-month international investigation (with collaboration from the U.S. Embassy and Interpol) had failed to support the charges on which Petitioners had been arrested. CAJA 58-59.[3] On the same day, the Human Rights Chamber for Bosnia and Herzegovina—a tribunal established under the U.S.-brokered Dayton Peace Agreement and staffed by judges from several European countries—issued an order forbidding Petitioners' removal from Bosnian territory. CAJA 202 ¶ 230.

B. Handover To U.S. Forces And Transportation To Guantanamo Bay

Late that day, however, as Petitioners were being released from the Central Prison in Sarajevo, Bosnian police—acting again under pressure from U.S. officials and in defiance of the Human Rights Chamber's order—seized Petitioners and delivered them to U.S. military personnel stationed in Bosnia. The U.S. military transported Petitioners to Guantanamo, where they have been held ever since. Petitioners have no direct contact with their families, and the government closely limits the frequency and length of counsel visits.

Transferring Pet'rs to Algeria, Ex. A at 2, *Boumediene* v. *Bush*, No. 05-5062 (D.C. Cir. Sept. 21, 2005) ("*Boumediene* Transfer Mem.").

[2] *See, e.g., id.*, Ex. A1 at 4-5.

[3] Citations to "CAJA" are to the joint appendix filed in the court of appeals in this case.

The Human Rights Chamber later determined that the Bosnian government violated Bosnian law and European law (directly applicable in Bosnia) by allowing the United States to remove Petitioners to Guantanamo. CAJA 123-253. Bosnia has since repeatedly stated its willingness to accept Petitioners' return.[4]

C. The Habeas Petitions And Government Returns

In July 2004, counsel for Petitioners commenced these habeas corpus proceedings. Pet. for Writ of Habeas Corpus, *Boumediene* v. *Bush*, No. 04-1166 (D.D.C. July 8, 2004). Several other Guantanamo prisoners also filed petitions. The district court assigned a coordinating judge (Green, J.) to manage all pending Guantanamo habeas cases. CAJA 327-328. The coordinating judge ordered the government to file factual returns to the petitions. In response, the government submitted what it described as the "record" of Combatant Status Review Tribunals (CSRTs) that the military had recently held for each Petitioner.

The Department of Defense created the CSRT process in the wake of *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), to "review" the military's determination, previously made in "multiple layers of review by military officers and officials of the Department of Defense" (06-1196 Pet. App. 150), that prisoners at Guantanamo were "enemy combatants" (Pet. App. 81a-82a). The governing CSRT procedures did not, however, incorporate the definition of "enemy combatant" that the government had advanced in *Hamdi* and that this Court held described a category of persons whom the government was authorized to detain. *See* 542 U.S. at 516 (plurality opinion) (quoting government's definition of "enemy combatant" as an individual "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there" (internal quotation marks omitted)). Instead, the new definition, promulgated nine days after *Hamdi* was announced, included any-

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[4] *See, e.g.*, *Boumediene* Transfer Mem., Ex. A1 at 10-11.

one "part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners," whether or not those "associated forces" had any connection to the September 11 attacks or to the conflict in Afghanistan. Pet. App. 81a. This new definition is not limited to persons who actually "engaged in an armed conflict against the United States." 542 U.S. at 516.

The CSRT procedures departed in numerous ways from the basic requirements of due process. Most of the evidence the government presented to the CSRT panel was classified and, therefore, concealed from Petitioners under CSRT regulations. Pet. App. 39a, 82a. The following colloquy from the CSRT hearing of Petitioner Ait Idir (charged with "associat[ing] with" an unnamed but "known al Qaeda operative" (CAJA 493)) is illustrative (Pet. App. 83a-84a):

> Detainee: Give me his name.
>
> Tribunal President: I do not know.
>
> Detainee: How can I respond to this?
>
> Tribunal President: Did you know of anybody that was a member of Al Qaida?
>
> Detainee: No, no.
>
> Tribunal President: I'm sorry, what was your response?
>
> Detainee: No.
>
> Tribunal President: No?
>
> Detainee: No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.
>
> Tribunal President: We are asking you the questions and we need you to respond to what is on the unclassified summary.

* * *

> Detainee: Why? Because these are accusations that I can't even answer. I am not able to answer them. You tell me I am from Al Qaida, but I am not an Al Qaida. I don't have any proof to give you except to ask you to catch Bin Laden and ask him if I am a part of Al Qaida. To tell me that I thought, I'll just tell you that I did not. I don't have proof regarding this. What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.

Petitioners were also prevented from offering documentary or testimonial evidence unless the CSRT panel concluded that it was "reasonably available" (Pet. App. 82a)—a standard that, in practice, excluded much readily-accessible evidence. For instance, Petitioner Boudella requested the January 2002 order of the Bosnian Supreme Court ordering him released from custody. CAJA 576, 582. The CSRT panel concluded that the decision was "not reasonably available" (*id.* 582), even though the decision had been filed in the district court and served on counsel for the government.[5] Petitioner Nechla sought testimony from his supervisor in the Bosnian office of the Red Crescent. His CSRT panel held the witness not reasonably available (*see id.* 520) even though counsel easily located him by calling the Red Crescent number listed in the Sarajevo telephone directory.

The CSRT regulations permitted the panel to "consider any information it deem[ed] relevant and helpful to a resolution of the issue before it," including hearsay and evidence procured by torture or coercion. Pet. App. 82a. The rules

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[5] *See* Opp. to Mot. for Joint Case Mgmt. Conference, Entry of Coordination Order & Request for Expedition, Ex. B, *Boumediene* v. *Bush*, No. 1:04-cv-01166-RJL (D.D.C. Aug. 16, 2004). There is in fact no doubt that the Bosnian Supreme Court's opinion was available to those who prepared the CSRT record because the opinion and the affidavit of Mr. Boudella's wife—which the CSRT panel expressly considered as an exhibit—were attached to the same filing. CAJA 584.

also imposed a "rebuttable presumption in favor of the Government's evidence." *Id.* Representation by counsel, even with security clearance, was expressly forbidden. 06-1196 Pet. App. 155. Instead, the rules only allowed Petitioners to meet briefly with a "Personal Representative," who was not a lawyer, did not represent the detainee's interests, and could not have confidential communications with him. *Id.* 151, 168-169, 172.

D. The District Court Decision

The government moved to dismiss all habeas petitions filed on behalf of Guantanamo prisoners on the theory that the facts alleged, even if true, did not warrant a grant of habeas relief. Pet. App. 56a & n.6. Judge Leon, to whom Petitioners' case was assigned, granted the government's motion. *Id.* 79a. The court held that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), authorized Petitioners' detention. Pet. App. 62a. The court also rejected Petitioners' constitutional challenges, holding that aliens who are not "located within sovereign United States territory" have no constitutional rights. *Id.* 63a.

Shortly thereafter, in cases involving other Guantanamo petitioners, the coordinating judge denied the government's motion to dismiss, ruling *inter alia* that "all [Guantanamo] detainees possess Fifth Amendment due process rights." *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005) (Green, J.).

E. The Court Of Appeals Decision

A divided panel of the court of appeals vacated the district court judgments and dismissed the cases for lack of jurisdiction. The majority concluded that the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (MCA)—enacted during the pendency of the appeal—operated to strip federal jurisdiction over Petitioners' habeas petitions. Pet. App. 6a-9a. The majority concluded that the MCA did not offend the Suspension Clause because, in its view, habeas corpus as of 1789 did not extend to "aliens outside the sovereign's territory." *Id.* 10a. The majority also held, relying on *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950),

that Petitioners could not invoke the Suspension Clause because the Constitution does not confer rights on "aliens without presence or property within the United States." Pet. App. 12a-13a.

Judge Rogers dissented, concluding (based on this Court's analysis in *Rasul* v. *Bush*, 542 U.S. 466 (2004)) that the Suspension Clause protected Petitioners' right to seek habeas. Pet. App. 33a-37a. Judge Rogers also concluded that the MCA's alternative procedure—review of CSRT determinations under section 1005(e)(2) of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (DTA)—was not an adequate substitute for habeas and thus had "no effect on the jurisdiction of the federal courts to consider these petitions." Pet. App. 42a.

SUMMARY OF ARGUMENT

The Suspension Clause prevents Congress from abrogating Petitioners' access to the Great Writ. As a majority of this Court previously concluded, the common law writ known to the Framers ran to territories under the sovereign's control, regardless of whether they were formally considered sovereign territory. *Rasul* v. *Bush*, 542 U.S. 466, 481-482 (2004). The practice of English courts in India before England asserted sovereignty there reinforces that conclusion. Nothing in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), compels a contrary result, especially in light of the "'implied protection' of the United States" that applies to Guantanamo prisoners. *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in the judgment) (quoting *Eisentrager*, 339 U.S. at 777-778).

Review of CSRT determinations under the DTA does not remotely compare to the protections of the common law writ. Historically, habeas review of executive detention was a speedy and effective means of obtaining plenary judicial consideration of the asserted factual and legal basis for detention, including consideration of the petitioner's evidence in rebuttal. Unless the custodian satisfied the court that the detention had a lawful basis, the court ordered release.

The DTA process provides none of these protections. In *Bismullah* v. *Gates*, 2007 WL 2067938 (D.C. Cir. July 20,

2007), the court held that the statute limits the "record on review" to evidence in the government's possession, preventing DTA petitioners from placing their own evidence before the reviewing court. The statute also forbids the court from viewing the evidence neutrally, as a habeas court would, and institutes "a rebuttable presumption in favor of the Government's evidence." DTA § 1005(e)(2)(C)(i). And it provides no express authority for the reviewing court to order a prisoner's release, raising the specter of an endless loop of remands and appeals for even successful DTA petitioners. Indeed, DTA review is slowed by the fact that its procedural mechanisms are only now being tentatively explored, even though Petitioners are in their sixth year of detention. The DTA is no adequate substitute for habeas corpus.

Moreover, the government has failed to show any lawful basis for Petitioners' imprisonment. The government relies on the CSRT determinations that Petitioners were enemy combatants, but those determinations turned on a definition of "enemy combatant" that is not authorized by the AUMF, the government's proffered statutory basis for detention. The government argues that the authorization of force against "organizations" connected to the September 11 attacks permits the indefinite military detention of any person who gave "support[]" to al Qaeda or "associated forces," even if the alleged "support[]" was unrelated to combat or, for that matter, unintentional. This argument finds no basis in the AUMF or in "longstanding law-of-war principles." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion).

Petitioners' detention also violates the fundamental Fifth Amendment right against imprisonment without due process of law—a right Petitioners may invoke due to their imprisonment in a territory subject to the exclusive jurisdiction and control of the United States. Although the government has subjected Petitioners to a very serious deprivation of liberty—indefinite and potentially lifelong military detention—it has failed to offer basic procedures required by due process, including meaningful notice of the bases for detention and an opportunity to be heard before an independent decisionmaker. Whatever procedures or standards might have been

acceptable had they been implemented timely and carried out neutrally, and whatever procedures might be acceptable with respect to future arrivals at Guantanamo, due process cannot brook further experimentation and delay with respect to these Petitioners after nearly six years of detention. Petitioners are therefore entitled to habeas relief.

ARGUMENT

The Founders of our nation created a Constitution dedicated to the protection of liberty, not one that turns a blind eye to indefinite detention without a meaningful opportunity to be heard. The Suspension Clause of Article I stands as the surest guarantee of liberty and due process by preventing Congress from abolishing habeas corpus or replacing it with a procedure that does not afford a petitioner a meaningful way to challenge his imprisonment. By allowing the indefinite military detention of Petitioners to stand without adequate judicial examination, the court of appeals disregarded the Founders' deliberate protection of the greatest legal instrument they knew. Once that error is corrected, it is clear that Petitioners' detention is both unauthorized and unconstitutional.

I. THE MCA'S PURPORTED REPEAL OF HABEAS IS UNCONSTITUTIONAL

This Court has held that, at a minimum, the Suspension Clause protects habeas corpus as it existed in 1789, and that access to the Great Writ may not be restricted unless Congress clearly and validly suspends the writ or provides an adequate and effective substitute for habeas review.

The government has never contended in this case that the MCA meets the requirements for a valid suspension of the writ. Nor could it do so, given that suspension is only a temporary measure in times of "Rebellion or Invasion." U.S. Const. art. 1, § 9, cl. 2. The MCA purports permanently to abrogate habeas corpus for certain individuals and without Congress having found a "Rebellion or Invasion." Accordingly, because *Rasul* correctly determined that the writ at common law would have extended to persons in Petitioners' position, and because the substitute DTA review process is

plainly inadequate, the MCA violates the Suspension Clause insofar as it denies Petitioners access to the writ.[6]

A. The Suspension Clause Protects Petitioners' Access To The Writ

"[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001) (quoting *Felker* v. *Turpin*, 518 U.S. 651, 663-664 (1996)). As a threshold matter, it is clear that Petitioners would be entitled to the common law writ if they were being held in a state or territory of the United States. Because Guantanamo is within the "'territorial jurisdiction' of the United States," the common law writ is equally available to Petitioners. *Rasul* v. *Bush*, 542 U.S. 466, 480 (2004) (citation omitted); *see id.* at 487 (Kennedy, J., concurring in the judgment) ("Guantanamo Bay is in every practical respect a United States territory" and "belongs to the United States"). This Court thus made clear in *Rasul* that recognizing the right of "persons detained at the [Guantanamo] base" to challenge their detention on habeas was "consistent with the his-

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[6] The Court may avoid this outcome by holding that the MCA does not repeal habeas jurisdiction in cases pending when the MCA was enacted, in accordance with well-settled rules of statutory construction. Section 7(a) of the MCA purports to strip jurisdiction over two distinct categories of cases: (1) "an application for a writ of habeas corpus" filed by or on behalf of certain aliens (28 U.S.C. § 2241(e)(1)); and (2) "any other action against the United States or its agents *relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement*" of such an alien" (*id.* § 2241(e)(2) (emphasis added)). Section 7(b), which sets out the effective date of section 7(a), provides only that section 7(a) applies to pending cases that are in the *second* category—cases "*which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention* of an alien detained by the United States since September 11, 2001." MCA § 7(b) (emphasis added). The MCA does not provide—much less contain an "unmistakably clear statement" (*Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2764 (2006))—that section 7(a) repeals jurisdiction in habeas cases pending on the date of enactment. Moreover, a "negative inference" (*id.* at 2765) arises from another section of the MCA that specifically repealed jurisdiction in military commission cases "notwithstanding any other provision of law (*including section 2241 of title 28 or any other habeas corpus provision*)." MCA § 3(a)(1) (adding 10 U.S.C. § 950j(b)) (emphasis added).

torical reach of the writ of habeas corpus." *Id.* at 481. There is no plausible justification for revisiting *Rasul*'s well-considered conclusion.

1. As *Rasul* explained, the writ in 1789 was not limited to formally "sovereign" territory or to the sovereign's own citizens

Defying this Court's analysis in *Rasul*, the panel majority below instead embraced the *Rasul* dissent. It concluded that, because the cases cited in *Rasul* did not involve "'aliens held outside the territory of the sovereign,'" there was no evidence that persons in Petitioners' position would have benefited from the writ in 1789. Pet. App. 13a (quoting 542 U.S. at 505 n.5 (Scalia, J., dissenting)).

The Court in *Rasul* expressly considered and rejected that view. 542 U.S. at 482 n.14 (rejecting contention that "habeas corpus has been categorically unavailable to aliens held outside sovereign territory"). Quoting Lord Mansfield, the Court noted that "even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'" *Id.* at 482 (quoting *R.* v. *Cowle*, 97 Eng. Rep. 587, 598-599 (K.B. 1759)). The Court recognized that, at common law, "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" *Id.* (quoting *Ex parte Mwenya*, 1 Q.B. 241, 303 (C.A. 1960)). The Court also observed that, in circumstances where the Crown exercised the requisite control, the writ extended to citizens and aliens alike. *See id.* at 482 n.14 ("'the remedy of habeas corpus was not confined to British subjects,' but would extend to 'any person ... detained' within reach of the writ" (internal quotation marks omitted)).[7]

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[7] As early as 1697, the King's Bench rejected the argument that an alien was "not intitled to have a habeas corpus." *Du Castro's Case*, 92 Eng. Rep. 816 (K.B. 1697) (ordering discharge of alleged foreign spy). Early American courts likewise granted habeas relief even to admitted

Rasul's conclusion is confirmed by the practice of British judges who, sitting in India's Bengal province in the 1770s, issued the writ in favor of Indian petitioners, even though the Crown had not asserted formal sovereignty over India and did not do so until 1813. *See* Charter Act, 1813, 53 Geo. 3, c. 155, § XCV. During this period, the Moghul emperor retained sovereignty pursuant to the Treaty of Allahabad of 1765. *See* Jain, *Outlines of Indian Legal System* 69-70 (1972). In 1774, the Crown chartered the Supreme Court of Judicature in Calcutta and appointed four judges from the King's Bench.[8] The British judges recognized that they had the power to issue the common law writ.[9] Indeed, prior to 1789, British judges in Calcutta issued habeas writs to secure the release of Indian petitioners (*i.e.*, non-citizens in non-sovereign territory) from detention by both the East India Company and Indian rulers.[10] These cases

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enemy aliens. *See Rasul*, 542 U.S. at 481 n.11 (citing cases); *see also United States* v. *Williams* (C.C. Va. 1813) (Marshall, C.J.) (granting habeas relief to British enemy alien because the warrant was defective), *discussed in* Neuman & Hobson, *John Marshall and the Enemy Alien*, 9 Green Bag 39, 41 (2005); *United States* v. *Villato*, 2 U.S. (2 Dall.) 370 (C.C. Pa. 1797) (granting habeas relief to Spanish-born prisoner charged with treason on ground that he had never become a U.S. citizen, *i.e.*, because he was in fact an alien); *cf. Lockington's Case*, Bright. (N.P.) 269 (Pa. 1813) (holding that a British resident imprisoned in Pennsylvania during the War of 1812 was entitled to review of his detention on the merits). Courts also granted habeas relief to slaves, who were not considered rights-bearing citizens at the time the Constitution was ratified. *See, e.g., Arabas* v. *Ivers*, 1 Root 92 (Conn. Super. Ct. 1784) (granting habeas relief to slave based on his service in Continental Army).

[8] *See* East India Company Act, 1773, 13 Geo. 3, c. 63; Pandey, *The Introduction of English Law Into India* 34-35 (1967); Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* 81 (2003).

[9] *See R.* v. *Mitter* (1781) (Chambers, J.) ("the powers of Justices of the Court of King's Bench at common law, are given severally and respectively to the Judges of this Court; and (as according to Blackstone) the Judges of the King's Bench used to issue writs of habeas corpus severally, we have agreed that we have severally authority to issue the writ"), in 1 *The Indian Decisions* 1008 (Row ed. 1911); *R.* v. *Hastings* (1775) (Chambers, J.) ("we are empowered to grant the writ of *habeas corpus*"), in 1 *The Indian Decisions* 1005, 1007.

[10] *See, e.g., Kamaluddin's Case* (1775), *discussed in* Pandey 111-115

confirm *Rasul*'s conclusion that the common law writ was available to aliens in territories under the Crown's *de facto* control, regardless of formal "sovereignty."[11]

Neither the panel majority below nor the government rebutted the Indian cases, nor did they identify a single pre-1789 case in which the common law writ was held *unavailable* to an alien in a non-sovereign territory under the King's control. The majority cited Robert Chambers for the proposition that "the writ of habeas corpus extended only to the King's dominions." Pet. App. 11a (citing 2 Chambers, *A Course of Lectures on the English Law Delivered at Oxford 1767-1773*, at 7-8 (Curley ed., 1986)). But the "King's dominions" are *not* limited to "sovereign territories." The former term, as the Court correctly recognized in *Rasul*, includes not only sovereign territories but also areas over which the Crown exercised *de facto* control. *See* 542 U.S. at 482 & n.14; *see also* Hale, *The Prerogatives of the King* 19 (Yale ed. 1976) (describing King's dominions as "places or territories to which the government of the king of England extends"). Indeed, the Robert Chambers cited by the panel majority was the same Chambers who, as a judge, granted writs of habeas corpus to

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(issuing writ twice on behalf of Indian revenue collector detained by Company over late payments); *Naderah Begum's Case* (1777), *discussed in* Pandey 140 (issuing writ against the Nazim in favor of Indian detained on forgery charges); *Sarupchand* v. *Members of the Dacca Council* (1777), *discussed in* Pandey 149 (issuing writ in favor of native Indian treasurer imprisoned by Dacca Council for debts); *see also* Br. of Amici Legal Historians (chronicling other pre-1789 Indian habeas cases).

[11] The government contends that the court in Calcutta did not have authority to issue the writ of habeas corpus. Br. in Opp. 26 n.11. But as shown in the main text, the individual judges of that court, like the judges of the King's Bench, had the power severally to issue the common law writ in India and exercised that power regularly. *Cf.* Habeas Corpus Act, 1816, 56 Geo. 3, c. 100 (authorizing "any one of the justices of one bench or other" to award the writ in vacation time); 28 U.S.C. § 2241(a) ("Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge[.]").

Indians in Calcutta before it was a sovereign territory (*see supra* nn. 9 & 10).[12]

The panel majority's statement that the writ did not extend to "'remote islands, garrisons, and other places'" (Pet. App. 12a (citation omitted)) is equally misplaced—at least with respect to locations under the Crown's control. That suggestion might be accurate as to the *practical* reach of the writ given the limitations on travel and communication; but it is inaccurate as to the courts' *legal* power to issue the writ. *See, e.g., Cowle*, 97 Eng. Rep. at 599-600 (acknowledging judicial power, despite lack of practice, to send writ to islands of Jersey and Guernsey as well as garrison of Minorca); *R.* v. *Overton*, 82 Eng. Rep. 1173 (K.B. 1668) (issuing writ to Jersey).[13]

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[12] The panel majority also misapprehended Lord Mansfield's statement in *Cowle* that "'[t]o foreign dominions ... this Court has no power to send any writ of any kind.'" Pet. App. 11a-12a (citation omitted). "[F]oreign dominions" are distinct from British colonies, protectorates, or other non-sovereign territories brought under subjection of the Crown. Rather, the term was limited to a notably discrete category of separate kingdoms that "belong to a prince who succeeds to the throne of England," namely Scotland and Hanover. *Cowle*, 97 Eng. Rep. at 599-600. Although held by the same monarch, foreign dominions did "not in any wise appertain to the crown" of England and were "entirely unconnected with the laws of England"—thereby lying outside the habeas jurisdiction of the King's Bench. 1 Blackstone, *Commentaries on the Laws of England* *106 (1769). Extending the writ to such "dominions" was also unnecessary because they had independent local courts "by which the liberty of the subject could be effectually protected." *Ex parte Brown*, 122 Eng. Rep. 835, 840 (K.B. 1864). Accordingly, Lord Mansfield's statement in no way limited the ability of common law judges to issue the writ to non-sovereign territory under the Crown's control, such as India.

[13] Moreover, after the Earl of Clarendon imprisoned numerous political prisoners offshore, Parliament responded with the Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (1679 Act). The 1679 Act expressly clarified that the writ *did* extend overseas, including to Jersey and Guernsey where Clarendon and others (including Cromwell) had sent prisoners. *Id.* § XI; *Administration of Justice During the Usurpation of the Government*, 5 Corbett's State Trials 935, 942 (1810) ("divers commoners of England had, by illegal warrants, been committed to prison into the islands of Jersey, and other the islands belonging to this Commonwealth"). The 1679 Act also made it illegal to send detainees to "Parts, Garrisons, Islands or Places beyond the Seas, which are or at any time hereafter shall be within or without the Dominions

There is no reason to reconsider *Rasul*'s well-supported conclusion that the common law writ was available in 1789 to aliens in territory (sovereign or not) under the King's control. The Guantanamo Bay Naval Station is under the "'complete jurisdiction and control'" of the United States. *Rasul*, 542 U.S. at 480 (citation omitted). It follows that Petitioners' right to habeas is protected by the Suspension Clause.[14]

2. Petitioners may invoke the Suspension Clause notwithstanding *Eisentrager*

The panel majority relied on *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), for two sweeping propositions: that common law habeas would not extend to Petitioners (Pet. App. 13a), and that Petitioners could not invoke the Suspension Clause (or any other constitutional provision) regardless because they are "aliens without property or presence within the United States" (*id.* 14a). Neither proposition has merit be-

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of his Majesty." 1679 Act, § XII. Parliament thus foreclosed detention in places where the writ may have been *practically* unenforceable, while confirming that it remained *legally* available in territories under the Crown's control.

[14] Although the Court need not reach the issue here, the MCA would violate the Suspension Clause even if there were no pre-1789 case extending the writ to those in Petitioners' situation. The Framers would have been gravely concerned about the possibility of the President imprisoning indefinitely hundreds of men in a military base under the exclusive jurisdiction and control of the United States without any access to habeas corpus. The Framers were aware of prior English efforts to use offshore detention to avoid judicial review and of the subsequent prohibition on this practice in the 1679 Act. *See Federalist No. 84* (Hamilton) (citing Blackstone). Regardless of whether they could have anticipated the specific circumstances of Guantanamo, they designed the Suspension Clause precisely to protect against the possibility that the Executive would devise novel tactics to restrain liberty without judicial review. *See id.* ("confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government" (quoting 1 Blackstone, *Commentaries* *136)). Accordingly, whether characterized as a pre-1789 or a post-1789 development, Petitioners' access to the writ is protected by the Suspension Clause. *See Felker*, 518 U.S. at 664 (assuming that "the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789").

cause, as the Court explained in *Rasul*, *Eisentrager* does not control here.[15]

In *Eisentrager*, the Court denied habeas relief to German nationals imprisoned at a jointly-controlled Allied prison in Germany, following their conviction by a military commission. But Guantanamo prisoners are "differently situated from the *Eisentrager* detainees" in several important respects:

> They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two [now almost six] years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Rasul, 542 U.S. at 476.

Justice Kennedy likewise explained that the situation of Guantanamo prisoners is "distinguishable from ... *Eisentrager* in two critical ways." 542 U.S. at 487 (concurring in the judgment). First, unlike Germany, "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities." *Id.* Aliens at the Allied prison in *Eisentrager* had no constitutional "privilege of litigation" because they were not under the "implied protection" of the United States; by contrast, aliens at Guantanamo are. *Id.* ("[T]he indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." (quoting *Eisentrager*, 339 U.S. at 777-778)).[16]

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[15] As an initial matter, the latter proposition reflects a misunderstanding of the requirements to raise a Suspension Clause claim. A determination that Petitioners could have invoked the writ as it existed in 1789 necessarily means that they can invoke the protection of the Suspension Clause. *See Felker*, 518 U.S. at 663-664. The panel majority's imposition of an additional "standing" requirement is both unprecedented and unjustified.

[16] The governing agreement between the United States and Cuba "is no ordinary lease." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in the

Second, the Guantanamo prisoners' "indefinite detention without trial or other proceeding presents altogether different considerations" from detention of the *Eisentrager* prisoners, who were admitted enemy aliens and convicted of war crimes after a full military commission trial. 542 U.S. at 488. Petitioners' indefinite detention without charge or trial "sug-

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judgment). It confers upon the United States "complete jurisdiction and control" in perpetuity, and the United States has subsequently exercised all the incidents of sovereignty over Guantanamo. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418. Cuban courts have therefore held that "the territory of that Naval Station is for all legal effects regarded as foreign." *In re Guzman*, Ann. Dig. & Reps. of Pub. Int'l L. Cases 112, 113 (Cuba S. Ct. 1934). Other authorities likewise characterize the United States as presently sovereign at Guantanamo. *See* Murphy, *The History of Guantanamo Bay* (1953), *available at* http://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistmurphy/gtmohistmurphyvol1/gtmohistmurphyvol1ch03/CNIC_040535 (according to former commander of Guantanamo, the Naval Station "would revert to the ultimate sovereignty of Cuba" only if U.S. occupation terminated); Lazar, *"Cession in Lease" of the Guantanamo Bay Naval Station and Cuba's "Ultimate Sovereignty,"* 63 Am. J. Int'l L. 116, 117 (1969) (noting that the United States and Cuba, in a 1912 amendment, described Guantanamo as *"ceded in lease,"* which indicates a transfer of sovereign authority to the United States with reversionary interest in Cuba); *see also* Br. of Amici Retired Military Officers.

The agreement between Great Britain and China regarding the Hong Kong territories, executed only five years before the Guantanamo lease, similarly stated that Great Britain "shall have sole jurisdiction" in the newly leased lands. Convention Between Great Britain and China Respecting an Extension of Hong Kong Territory, June 9, 1898, 21 U.S.T. 293, 294. Despite the lack of an express grant of sovereignty, even China recognized that Great Britain exercised sovereign control over Hong Kong for the duration of the lease. *See, e.g.*, Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, Sept. 26, 1984, 23 I.L.M. 1366, 1371 ¶ 3(1) (China would "resum[e]" sovereignty over Hong Kong upon expiration of lease). And British courts in Hong Kong routinely made the common law writ available to aliens detained in the leased territories. *See, e.g., Tan Te Lam* v. *Superintendent of Tai A Chau Detention Centre*, 2 H.K.L.R. 169 (P.C. 1996) (granting habeas relief to Taiwanese-Vietnamese nationals detained under immigration ordinance); *In re Lo Tsun Man*, 5 H.K.L.R. 166, 172 (F.C. 1910) ("[T]he right to the writ is shared with British subjects by aliens in the Colony, and exists at common law.").

gests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus." *Id.*

Given *Rasul*'s recognition of the important distinctions between Germany and Guantanamo and of the indisputable difference between admitted, convicted enemy aliens and Petitioners, who are all civilians from a friendly nation and deny any act of belligerency, *Eisentrager* in no way impedes Petitioners' ability to invoke the Suspension Clause.

B. The MCA Does Not Provide An Adequate Substitute

Since the Suspension Clause protects Petitioners' access to habeas, the MCA's repeal of it is invalid unless the government demonstrates the existence of an "adequate and effective" substitute through which Petitioners may challenge their detention. *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977).

This Court has found substitute procedures to be constitutionally adequate on only two occasions. In both cases, Congress had crafted new procedures that were virtually identical to the displaced statutory habeas scheme. *See* 430 U.S. at 377 n.9 (replacement procedure was "'modeled on [the federal habeas statute that it replaced] with only necessary technical changes,'" using "almost identical language" to secure an effectively identical procedure (citation omitted));[17] *Hill* v. *United States*, 368 U.S. 424, 427 (1962) (noting that the substitute procedure approved by *United States* v. *Hayman*, 342 U.S. 205 (1952), was "exactly commensurate with that which had previously been available by habeas corpus").

Swain and *Hayman* thus suggest that the Suspension Clause prohibits the substitution of any process that fails to provide the core procedures and remedies available under the

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[17] While the procedure in *Swain* took place in front of non-tenured judges in the Superior Court of the District of Columbia, those judges were charged with general jurisdiction over criminal matters and presumed by the Court to be competent and impartial decisionmakers. 430 U.S. at 381-383. The Court emphasized that the statute allowed detainees to pursue habeas relief under the old statutory structure if the new procedure proved "inadequate or ineffective" (*id.* at 383) and noted in particular that this savings clause was available if the Superior Court judges failed in practice to act as neutral decisionmakers (*id.* at 383 n.20).

pre-existing habeas regime. Review of CSRT determinations under the DTA does not meet this standard—a point the government has admitted in other contexts. *See* Mot. to Govern Further Proceedings & Opp. to Mot. to Govern 8, *Parhat* v. *Gates*, No. 06-1397 (D.C. Cir. Mar. 9, 2007) (chiding DTA petitioners for "seek[ing] to recreate much of the district court habeas regime that Congress abrogated").

Indeed, DTA review lacks the essential procedures and protections of the writ "'as it existed in 1789,'" which is the "absolute minimum" protection provided by the Suspension Clause. *St. Cyr*, 533 U.S. at 301 (quoting *Felker*, 518 U.S. at 663-664). Particularly where the Executive's procedures were so manifestly inadequate, the common law writ would have guaranteed Petitioners, at a minimum, an opportunity to present evidence demonstrating the unlawfulness of detention; a neutral and plenary review of all the evidence; a court empowered to order release; speedy resolution of claims; and full representation by counsel. The DTA offers none of these protections.

1. In 1789, habeas corpus provided a robust and independent factual and legal review of non-criminal executive detention

At common law, the scope of habeas review turned on the procedures a prisoner had received at the outset of his detention. Petitioners subject to detention without the procedural protections of a criminal trial were entitled to a searching and independent judicial inquiry into the basis for their detention. *E.g.*, *Bushell's Case*, 124 Eng. Rep. 1006, 1010 (C.P. 1670) (conducting rigorous habeas review behind the return where prisoner has not had an "indictment and tryal"). This included the ability to controvert the jailer's return with evidence of their own. *See, e.g.*, Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 454 & n.20 (1966); Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus* 270-271 (2d ed. 1876); Sharpe, *Habeas Corpus in Canada*, 2 Dalhousie L.J. 241, 258-259, 264 (1975). Discretionary Executive detention without prior independent judicial review received particular scrutiny, falling

squarely within the "historical core" of habeas corpus where "its protections have been strongest." *St. Cyr*, 533 U.S. at 301; *see also Lonchar* v. *Thomas*, 517 U.S. 314, 318 (1996) (writ's "most basic purpose" is "avoiding serious abuses of power by a government, say a king's imprisonment of an individual, without referring the matter to a court").[18]

In this case, Petitioners are entitled to precisely that "strongest" form of habeas scrutiny. The only process afforded to them by the government—CSRT determinations of "enemy combatant status"—was structurally and incurably inadequate. It is not just that the CSRT process failed to provide the protections of a criminal trial. *Compare Yamashita* v. *Styer*, 327 U.S. 1, 5 (1946) (military commission heard 286 witnesses; defendant represented by six lawyers). The CSRTs failed to offer even the most elemental aspects of an independent adversarial proceeding (*cf. St. Cyr*, 533 U.S. at 305-306), such as "notice of the factual basis for [Petitioners'] classification," "a fair opportunity to rebut the Government's factual assertions," and "a neutral decisionmaker" (*Hamdi* v. *Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion)).

The CSRTs gave Petitioners no meaningful notice of the alleged factual basis for their detention, most of which was classified. 06-1196 Pet. App. 156 (permitting detainee to view only "the unclassified portion of the Government Information").[19] Without the specific allegations against them or the assistance of counsel to procure exculpatory evidence and advocate before the tribunal, Petitioners had no opportunity to

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[18] Even in collateral attacks on criminal judgments, where common law courts often stated that habeas was limited to a review of the criminal court's "jurisdiction," expansive and flexible notions of jurisdictional review permitted broad factual and legal inquiries. Sharpe, *The Law of Habeas Corpus* 70 (2d ed. 1989) ("The courts have really never been prevented by [this] common law rule from reviewing facts essential to the jurisdiction or authority underlying the order for detention.").

[19] *See also* Denbeaux & Denbeaux, *No-Hearing Hearings* 2, 22-24 (2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf (Denbeaux Report) (noting that every publicly disclosed CSRT proceeding included some classified evidence and that most CSRTs relied *solely* on classified evidence).

rebut the government's allegations. And the panelists who decided their case were required by regulation to presume the genuineness and accuracy of the government's evidence (*id.* 159) and were personally subject to pervasive command influence and institutional predispositions to reach conclusions adverse to Petitioners (*see infra* pp. 29-30).

Petitioner Ait Idir pointed out the impossibility of refuting the conclusory and incomplete allegations against him. Although the government charged that "[w]hile living in Bosnia, the Detainee associated with a known Al Qaida operative," it would not disclose the name of that individual—leaving Mr. Ait Idir no way to confirm or deny the allegation. When Mr. Ait Idir pointed out the absurdity of the process, the CSRT panelists burst into laughter. Pet. App. 83a-84a; *see also In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 469-470 (D.D.C. 2005) ("[T]his exchange might have been truly humorous ... had [Mr. Ait Idir's] criticism of the process not been so piercingly accurate.").

To determine whether the DTA is an adequate substitute under the Suspension Clause, it must therefore be compared to the stringent form of habeas review applied to detentions where the petitioner had not received meaningful procedural protections akin to a common law trial. In such contexts, the Great Writ applied a robust set of protections:

(a) Opportunity to Present Evidence. Habeas petitioners detained without trial were given "full opportunity for the presentation of the relevant facts." *Harris* v. *Nelson*, 394 U.S. 286, 298 (1969). English courts refused to "willfully shut their eyes against such facts as appeared on the affidavits, but which were not noticed on the return." *Goldswain's Case*, 96 Eng. Rep. 711, 712 (C.P. 1778) (denying that "either the Court or the party are concluded by the return of a habeas corpus" and allowing petitioner, an impressed sailor, to "plead to it any special matter necessary to regain his liberty").

Habeas courts did not stop at the evidence collected or submitted by the jailer, but rather reviewed and took into account any evidence that the petitioner submitted as well. English courts frequently received affidavits from petitioners,

government officials, and third parties.[20] American courts followed suit, both before the Founding[21] and after.[22] Habeas courts also heard live testimony by petitioners and other witnesses.[23]

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[20] *See, e.g.*, *R.* v. *Delaval*, 97 Eng. Rep. 913, 915-916 (K.B. 1763) (ordering release of girl on the basis of affidavits demonstrating that her indenture was "plainly and manifestly, for bad purposes"); *Barney's Case*, 87 Eng. Rep. 683 (K.B. 1701) (ordering release of woman, "it appearing by affidavits of the fact, that it was a malicious prosecution"); *Gardener's Case*, 78 Eng. Rep. 1048 (Q.B. 1653) (ordering release based on evidence introduced by petitioner).

[21] *E.g.*, *New Jersey* v. *Liddle*, No. 31316, N.J. State Archives, Minutes Book No. 62, Folio p. 525 (N.J. Nov. Term 1785) (granting habeas relief to slave based on his submission of affidavits demonstrating the satisfaction of conditions of manumission promised by his deceased master); *In re Cross*, Pa. St. Archives, RG 33, Series 118 (Pa. Dec. 8, 1780) (discharging alleged deserters based on evidence not contained in the return, namely the expiry of the petitioners' period of enlistment). Pursuant to Rule 32(3), Petitioners will seek leave to lodge archival materials with the Clerk.

[22] *See, e.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 135 (1807) (reviewing written depositions to determine whether there was "sufficient evidence of [petitioners'] levying war against the United States" to justify detention); *United States* v. *Hamilton*, 3 U.S. (3 Dall.) 17, 18 (1795) (reviewing "affidavits of several of the most respectable inhabitants of the western counties" affirming that petitioner had not engaged in treasonous activity during an insurrection); *see also In re Thomas*, Nat'l Archives, Microfilm No. M434, Roll 1, Frames 259-267 (D.D.C. Nov. 13, 1833) (reviewing testimony, affidavit, and judicial certificates to conclude that petitioner was a free man and not a slave); *New Jersey* v. *Drake*, No. 34942, N.J. State Archives, Minutes Book No. 113, Folio p. 261 (N.J. Nov. 15, 1814) (reviewing extensive contradictory evidence, including documentary evidence and eleven affidavits collectively addressing circumstances of petitioner's purchase, promises made to petitioner, the petitioner's character, and the credibility of the various affiants); *Nickols* v. *Giles*, 2 Root 461 (Conn. Super. Ct. 1796) (conducting "inquiry" into conditions of daughter's treatment by mother).

[23] *E.g.*, *Wilson* v. *Izard*, 30 F. Cas. 131, 131 (C.C.N.Y. 1815) (reviewing claim that petitioners were exempt from impressment as "alien enemies," which was "a fact not appearing on the return, but sworn to at the time of the allowance of the habeas corpus"); *R.* v. *Turlington*, 97 Eng. Rep. 741 (K.B. 1761) (discharging woman from custody after reviewing doctor's affidavit and conducting examination of petitioner's mental condition); *R.* v. *Lee*, 83 Eng. Rep. 482 (K.B. 1676) (considering petitioner's testimony on

Even alleged prisoners of war in military detention were able to offer evidence supporting release, when they were detained within the jurisdiction of functioning courts and away from active hostilities. *See R.* v. *Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (reviewing affidavits submitted by petitioner and a third party in review of a Swedish national's detention as a prisoner of war); *see also Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779) (taking evidence in challenge by prisoners of war to their detention); *cf. United States* v. *Villato*, 2 U.S. (2 Dall.) 370 (C.C. Pa. 1797) (Spanish privateer introduced evidence challenging his detention for treason).

Petitioners in impressment cases were also able to introduce evidence rebutting the return. Deference to the military did not prevent courts from fulfilling their historic office in habeas proceedings by carefully probing all evidence relating to the alleged cause of detention. *E.g.*, *Delaware* v. *Clark*, 2 Del. Cas. 578 (Del. Ch. 1820) (discharging petitioner based on affidavits and live testimony from third parties proving that petitioner had enlisted while intoxicated and without his father's authorization); *In re Cornelius*, Md. State Archives, Accession No. MSA SC 5463-3-53 (D. Md. Sept. 10, 1827) (discharging petitioner from military service based on extrinsic evidence that he was underage); *Good's Case*, 96 Eng. Rep. 137 (K.B. 1760) (discharging petitioner on basis of affidavit explaining that he was not a sailor, but a ship-carpenter immune from impressment).

(b) Neutral and Plenary Review. Common law habeas afforded an impartial adjudicator who exercised independent judgment about the facts and law asserted in the jailer's return. Courts were emphatic that "our judgment ought to be grounded upon our own inferences and understandings, and not upon [the detaining authority's]." *Bushell's Case*, 124 Eng. Rep. at 1007; *see also* Sharpe, 2 Dalhousie L.J. at 253 & n.62 ("[T]he court decided for itself on the evidence[.]"). Habeas thus "cut[] through all forms" and "[came] in from the

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"oath in Court" that "she went in danger of her life by [her husband]" and should be freed from his custody).

outside, not in subordination to the proceedings." *Frank* v. *Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

These principles obliged habeas courts to evaluate independently a petitioner's detention, without any deference to the jailer's view of the evidence or the law. In particular, courts scrutinized without deference the jailer's claimed legal authorization for detaining the petitioner. *Ex parte d'Olivera*, 7 F. Cas. 853, 854 (C.C. Mass. 1813) (Story, J., on circuit) (ordering Portuguese sailor released on ground that federal desertion act authorized detention of American sailors only); *Somerset* v. *Stewart*, 98 Eng. Rep. 499, 509-510 (K.B. 1772) (Lord Mansfield) (requiring release of slave on ground that English law did not authorize his detention); *Chancey's Case*, 77 Eng. Rep. 1360, 1360-1361 (K.B. 1611) (holding that applicable statute did not authorize petitioner's imprisonment and rejecting High Commissioners' conclusion to the contrary).[24]

(c) Remedy of Release. Perhaps the principal attribute of common law habeas was the court's power to order release if the detention was unlawful. *See* 3 Blackstone, *Commentaries on the Laws of England* *133 (1769) ("[T]he court upon an habeas corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail or remand the prisoner."); *see also Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (purpose of habeas was "the liberation of those who may be imprisoned without sufficient cause"); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 136 (1807) (where imprisonment is unlawful, the court "can only direct [the prisoner] to be discharged"). The remedy was no less available for non-citizens and military prisoners. *See supra* n. 7; *Du Castro's Case*, 92 Eng. Rep. 816 (K.B. 1697) ("discharg[ing]" an alleged enemy alien spy from restraint imposed "by order

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[24] *See also, e.g., R.* v. *Judd*, 100 Eng. Rep. 139 (K.B. 1788) (conducting searching review of return to assess whether legal requirements for felony had been satisfied); *Delaval*, 97 Eng. Rep. at 916 (ordering release in part on the ground that the detainor's factual affidavit "is highly improbable"); *see also Moore* v. *Dempsey*, 261 U.S. 86, 92 (1923) (habeas does not "allow a Judge of the United States to escape the duty of examining the facts for himself").

of the Secretary of State" on grounds that government failed to bring a criminal prosecution for more than a year and a half). Indeed, the Habeas Corpus Act of 1640, in addition to abolishing the Star Chamber, emphasized that all prisoners subject to detention by similar executive mechanisms had the right to seek release. 16 Car. 1, c. 10, § 8; *see also* Duker, *A Constitutional History of Habeas Corpus* 47 (1980).

(d) Speedy Decision. The common law writ obliged courts to "afford [the petitioner] a *swift and imperative* remedy." *Price* v. *Johnston*, 334 U.S. 266, 283 (1948). Coke stated that English judges "have not suffered the prisoner to be long detained, but at their next comming have given the prisoner *full and speedy justice*, ... without detaining him long in prison." Coke, *The Second Part of the Institutes of the Laws of England* 43 (Brooke & Brooke eds., 5th ed. 1797) (emphasis added). The Habeas Corpus Act, 1679, 31 Car. 2, c. 2, which was intended to strengthen this guarantee, required "judges [to] come to a speedy determination." Sharpe, *The Law of Habeas Corpus* 19 (2d ed. 1989). Pre-1789 laws in America were similar. *E.g.*, Mass. Const. of 1780, pt. 2, ch. 6, art. VII ("The privilege and benefit of the writ of habeas corpus shall be enjoyed ... in the most free, easy, cheap, expeditious and ample manner[.]"); *Laws of the State of New York* ch. 39, at 73 (Loudon & Loudon eds., 1787) (guaranteeing "speedy [habeas] relief of all persons imprisoned for any such criminal, or supposed criminal matters"). The Framers thus viewed habeas as "the great remedy ... by which the judicial power speedily and effectually protects the personal liberty of every individual." Rawle, *A View of the Constitution of the United States of America* 117 (2d ed. 1829).

(e) Right to Counsel. Vigorous and untrammeled representation by counsel is a critical feature of habeas in Anglo-American law. As Blackstone noted, "if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person ... he shall, *upon demand of his counsel*, have a writ of habeas corpus." 1 Blackstone, *Commentaries* *134-135 (emphasis added). As was noted in 1763, "to refuse a Prisoner the Benefit of Council, is diametrically opposite to the fundamental Spirit of the

British Constitution." *An Authentick Account of the Proceedings against John Wilkes, Esq., with An Abstract of that precious Jewel of an Englishman, the Habeas Corpus Act* 14-15, 28 (1763) (criticizing the Secretary of State's restrictions on a habeas petitioner's access to counsel). Reference to arguments and evidence presented by habeas petitioners' counsel abound. *E.g.*, *Bollman*, 8 U.S. (4 Cranch) at 75; *United States* v. *Hamilton*, 3 U.S. (3 Dall.) 17, 18 (1795); *Somerset*, 98 Eng. Rep. at 499; *Chancey's Case*, 77 Eng. Rep. at 1360; *Bushell's Case*, 124 Eng. Rep. at 1007; *Darnel's Case*, 3 Corbett's State Trials 1, 2 (K.B. 1627).

2. Review of CSRT determinations under the DTA does not provide the essential protections of the writ as it existed in 1789

Instead of a searching and independent review of the facts and law bearing on the petitioner's detention, the DTA provides only a truncated and deferential survey of the faulty CSRT process and the preordained results it yielded. As Judge Rogers explained, "[f]ar from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantanamo detainee with an assortment of handicaps that make the obstacles insurmountable." Pet. App. 38a.

Bismullah v. *Gates*, 2007 WL 2067938 (D.C. Cir. July 20, 2007)—the court of appeals' initial step toward establishing specific procedures for DTA review—underscores that the many failings of DTA review, described in detail below, cannot be viewed in isolation. Rather, their cumulative impact multiplies their prejudice to Petitioners. Petitioners were unable to investigate or introduce exculpatory evidence before the CSRT, owing to their lack of counsel and the government's reliance on secret evidence that the detainees could not confront and thus disprove or explain. Not only does *Bismullah* immunize this skewed record from augmentation by counsel, but the DTA also requires the court of appeals to view it deferentially, applying a presumption in favor of the government. *Bismullah*'s restrictions on counsel's relationship and communications with Petitioners further undermine

counsel's ability to develop a meaningful challenge to the government's case. And even if a Petitioner were to succeed against this stacked deck, the only remedy may well be another CSRT and an endless cycle of DTA review and remand. As the following discussion shows, the DTA is not an adequate substitute for *any* of the core functions of the common law writ.

(a) No Opportunity To Present Evidence. As interpreted by *Bismullah*, the DTA prevents the court of appeals from conducting anything like the kind of searching factual review that would have been customary at common law. The court of appeals held that the "record on review" is limited to "'such reasonably available information *in the possession of the U.S. Government* bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant.'" *Bismullah*, 2007 WL 2067938, at *1 (emphasis added) (quoting CSRT rules). While the court of appeals thereby rejected the government's effort to limit the record to material that the government actually submitted to the CSRT panel,[25] its decision nonetheless means that the DTA record will consist only of a one-sided body of hearsay and second-hand summaries of evidence collected by the government with no meaningful input from the petitioner.[26]

Counsel's inability to correct this manifestly inadequate record by introducing new evidence is particularly prejudicial

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[25] Resp. Br. Addressing Pending Prelim. Mots. 49-68, *Bismullah* v. *Gates*, No. 06-1197 (D.C. Cir. Apr. 9, 2007) ("Gov't *Bismullah* Resp.").

[26] *See* J.A. 104-105 (Decl. of Lt. Col. Stephen Abraham) (describing information gathered by CSRT staff as "finished intelligence products of a generalized nature—often outdated, often 'generic,' rarely specifically relating to the individual subjects of the CSRTs or to the circumstances related to those individuals' status"); *id.* 108 ("What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence. Statements allegedly made by percipient witnesses lacked detail. Reports presented generalized statements ... without stating the source [or] establishing the reliability or the credibility of the source."); Pet. App. 82a (evidence procured by torture not prohibited in CSRT proceedings); *see also supra* pp. 4-5 (practical inability of detainees to introduce evidence in CSRT proceedings).

given that Petitioners had no meaningful opportunity to participate in the formation of the CSRT "record" in the first place. The bulk of the government's information was classified, so the prisoner could not know what was alleged against him, let alone offer explanations or evidence in rebuttal. Counsel was entirely barred from the CSRT proceeding, foreclosing any chance of supplementing that record through a meaningful investigation. 06-1196 Pet. App. 155. And even when Petitioners identified easily accessible documents and witnesses supporting their case, the CSRT panel refused to take them into evidence, concluding that they were not "reasonably available." *See supra* p. 5.

Moreover, while the CSRT procedures theoretically required CSRT personnel to collect exculpatory evidence from other government agencies, those agencies allowed CSRT personnel access only to "prescreened and filtered" information and denied them access to intelligence databases, refusing to run further searches for relevant information and summarily denying requests for written confirmation that no exculpatory information existed. J.A. 105-107 (Decl. of Lt. Col. Stephen Abraham).[27] This meant that the evidence that finally reached the CSRT panelists was systematically filtered, potentially culled of useful exculpatory information, and (because classified) immune to rebuttal. *Bismullah*'s refusal to consider anything beyond the "record on review"

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[27] As an agency data collection liaison and CSRT panelist at the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC), Lt. Col. Abraham developed a deep knowledge of the complete cycle of CSRT review. "[O]ne of only a few intelligence-trained and suitably cleared officers" at OARDEC, he visited "participating organizations" that proved uncooperative regarding exculpatory evidence "on a number of occasions." J.A. 105-106 (Abraham Decl.). Serving in this capacity from September 11, 2004, to March 9, 2005—a period when hundreds of CSRTs (including Petitioners') were conducted—he became intimately familiar with the roles of the CSRT staff, with the behavior of government agencies supplying the information, and with the spotty database from which information was drawn and screened by ill-trained junior personnel. *Id.* 104-105; *see also id.* 93-94 (Decl. of Rear Adm. James M. McGarrah).

(2007 WL 2067938, at *7) ensures that the court will never review the facts in full.

This concern is real. Petitioners' counsel uncovered significant exculpatory information affecting all six Petitioners, including evidence showing that the government itself developed grave doubts about the credibility of a principal source of its information—a convicted criminal named Ali El Hamad. Hamad, who is still serving a long prison sentence in Bosnia, harbors a personal hatred for Petitioner Lahmar (who divorced Hamad's wife's sister) and has strong incentives to curry favor with U.S. officials.[28] Under *Bismullah*, this and other rebuttal evidence could never be considered.

(b) No Neutral and Plenary Review. The prejudice of this systematically biased record is compounded by the court of appeals' inability to act as an independent decisionmaker under the DTA, which instead places a heavy thumb on the scale in favor of the government. DTA § 1005(e)(2)(C)(i) (imposing "a rebuttable presumption in favor of the Government's evidence"); *see also* Gov't *Bismullah* Resp. 50 (contending that DTA review applies "some evidence" standard to CSRT result). Such a presumption is inconsistent with the common law requirement that, when reviewing Executive detention, a habeas court's judgment "ought to be grounded upon [its] own inferences and understandings" (*Bushell's Case*, 124 Eng. Rep. at 1007).

The DTA's presumption against petitioners exacerbates a critical failing of the CSRTs, which also lacked neutral and independent decisionmakers. The CSRT panelists were under strong command pressure to rule in the government's favor, a pressure long recognized as the "mortal enemy of military justice." *United States* v. *Thomas*, 22 M.J. 388, 393

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[28] *Boumediene* Transfer Mem., Ex. A1 at 5-8. In a July 26, 2004 letter from Hamad to the U.S. SFOR Commander in Bosnia, Hamad began "I know that you do not trust to what I have publicly stated about Al Qaeda and its engagement in Federation of BiH" and complained it is "not right when you think that I only lie, that I do not speak truth and that I only try to get myself out of prison by this." *Id.* at 7.

(C.M.A. 1986). Senior military officials, as well as the Secretary of Defense, had repeatedly staked out an official position that the prisoners held at Guantanamo were the "worst of the worst." *Preparing for Role in War on Terror*, Wash. Post, Jan. 10, 2002, at A12. The "Implementing Procedures" themselves emphasized that "[e]ach detainee ... has previously been determined, since capture, to be an enemy combatant through multiple layers of review by military officers and officials of the Department of Defense." 06-1196 Pet. App. 150.

The CSRTs' structural bias was heightened by the governing regulations' establishment of a "rebuttable presumption that the Government Evidence ... is genuine and accurate." 06-1196 Pet. App. 159. And the resulting CSRT decisions were in turn reviewed by the panelists' superiors (*id.* 164), who were "well known" to subject detainee-favorable determinations to "intensive scrutiny" (J.A. 108 (Abraham Decl.)). Moreover, the Defense Department ordered multiple retrials of CSRT decisions until the Pentagon's desired result was reached. Denbeaux Report, *supra* n. 19, 37-38. Review by a deferential court cannot correct this preordained result.

(c) No Express Authority To Order Release. The DTA does not expressly authorize the court of appeals to discharge a DTA petitioner from custody. Rather, it directs the court solely to "determine the validity of any final decision of a [CSRT]"—*i.e.*, to assess whether a detainee's CSRT panel validly concluded that he is an enemy combatant. DTA § 1005(e)(2)(A). The government has argued that this provision limits the court of appeals to a single remedy: remanding successful DTA challengers to the executive branch for further consideration by a new CSRT. Gov't *Bismullah* Resp. 62-64. This falls far short of the clear and indisputable power of common law courts to "direct [habeas petitioners] to be discharged." *Bollman*, 8 U.S. (4 Cranch) at 136. Moreover, as a practical matter, even favorable determinations by new CSRTs appear powerless to compel Petitioners' release. *Cf.* Gov't Opp. to Mot. to Expedite Appeal 3, *Qassim* v. *Bush*, No. 05-5477 (D.C. Cir. Jan. 18, 2006) (contending that DTA forecloses judicial relief even for detainees exonerated by CSRTs).

(d) Lack of Speed. Rather than guarantee prompt review and resolution, DTA review guarantees these Petitioners—who are in their sixth year of confinement without judicial review—an additional excruciatingly long wait. The delay that has afflicted the DTA process to date is sure to continue, as the court of appeals struggles to address seriatim the numerous procedural questions left open by *Bismullah* and by Congress's failure to prescribe even a basic procedural framework for this purported substitute for the Great Writ. Even as to the first threshold question of evidentiary practice, *Bismullah* did not define the scope of "reasonably available" evidence that constitutes the record on DTA review. This ensures further rounds of litigation before this preliminary question is settled—a far cry from habeas, where experienced district court judges apply well-worn procedural and evidentiary standards on a backdrop of centuries of precedent. Pet. App. 48a-50a (Rogers, J., dissenting).

The government has also suggested that the court of appeals "proceed[] with [DTA] cases in stages, starting with a group of approximately five" out of the 130 that have been filed to date. Opp. to Mot. for Prod. of Info. 3, *Al-Haag* v. *Gates*, No. 07-1165 (D.C. Cir. Aug. 6, 2007). If the government has its way, 125 out of 130 DTA cases (including, presumably, Petitioners' cases) will not progress *at all* for what may well be years of procedural litigation. Whatever procedures Congress or the courts could conceivably craft in different contexts for future detainees, six years of military detention without a hearing for these Petitioners is far too long. Their habeas right to a speedy hearing should not be sacrificed while the court of appeals struggles to add content to a cryptic statute.

(e) Restrictions on Attorney-Client Relationship. The DTA regime also places significant limits on Petitioners' right to the advice and assistance of counsel in challenging their detention. This subversion of the counsel relationship is particularly prejudicial given Petitioners' experience before the CSRTs. The Defense Department's rules limited Petitioners to assistance from a "Personal Representative," who was not an attorney, was not bound to keep Petitioners' communica-

tions confidential, and was not permitted to serve as the detainee's "advocate." 06-1196 Pet. App. 151, 168-169, 172. The Personal Representative in Petitioners' cases accordingly presented no argument, and effectively no evidence, on Petitioners' behalf. CAJA 340, 360, 404, 409-411, 481, 527, 532-535, 589-590, 599; *see also* J.A. 109 (Abraham Decl.) ("The personal representative did not participate in any meaningful way."). It is no surprise that detainees viewed their Personal Representatives as adversaries. Denbeaux Report, *supra* n. 19, 16 (quoting detainee as saying "My personal representative is supposed to be with me. ... Now he is talking like he is an interrogator.").

For detainees thereby justifiably suspicious of an American legal "[r]epresentative," *Bismullah*'s interference with the counsel relationship has an especially pernicious effect. *Bismullah* prohibits any communications by mail except regarding "the events leading up to the detainees' capture and culminating in the conduct of his CSRT" and permits the government to review the substance of all attorney-client correspondence and redact it for compliance with its narrow subject matter restrictions. 2007 WL 2067938, at *2; Protective Order ¶¶ 2.I, 3.B, *Bismullah* v. *Gates*, No. 06-1197 (D.C. Cir. July 30, 2007). Any challenge to even the most unreasonable government redaction permits disclosure of the communication's contents to the Commander of the Guantanamo Naval Station—effectively forcing Petitioners to divulge legal communications to their direct custodian as a condition of securing effective legal assistance. *Id.* ¶ 3.D. Particularly since Petitioners' in-person visits with counsel are infrequent and severely curtailed, this regime strips attorney-client communications of both privacy and utility—a poisonous combination for counsel seeking detainees' guidance in developing a DTA challenge. The chill this casts on meaningful representation is wholly incompatible with the common law right to secure representation in habeas proceedings.

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The DTA review procedure falls far short of the prompt and plenary examination by an independent fact-finder that

would have reviewed Petitioners' detention and, if appropriate, ordered their release in 1789.[29] The MCA's repeal of habeas thus violates the Suspension Clause. At a minimum, therefore, the judgment of the court of appeals should be reversed and the case remanded for a full hearing on the merits of Petitioners' habeas claims.

II. PETITIONERS' IMPRISONMENT IS UNLAWFUL

The district court dismissed the habeas petitions in this case because it concluded that they stated "no viable legal theory" under which the writ could issue. Pet. App. 57a (Leon, J.). That was error for two independent reasons. First, the government has shown no provision of law authorizing the indefinite military detention of persons based on its exceptionally broad definition of "enemy combatant"—a definition that encompasses citizens of friendly nations who have not engaged in any form of combat against the United States. Second, Petitioners' imprisonment violates the Fifth Amendment because they were not afforded the minimum procedural protections required by the Due Process Clause.

A. No Act Of Congress Authorizes Indefinite Military Detention Based On The Government's Expansive Definition Of "Enemy Combatant"

In *Hamdi*, the government claimed the power to imprison "enemy combatants," a category that was limited to persons who were "'part of or supporting forces hostile to the United States or coalition partners in Afghanistan' *and who 'engaged in an armed conflict against the United States there.'*" 542 U.S. at 516 (plurality opinion) (emphasis added and citation omitted). This Court found that the AUMF authorized military detention of persons falling within this "limited category" because detention of enemy combatants (so

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[29] Nor do the exigencies of modern-day threats justify discarding these protections. As the Amici Specialists in Israeli Military Law and Constitutional Law explain in detail, Israel—a democracy that faces continuous and grave terrorist threats—vigorously honors all five of the common law protections discussed, even in cases of unlawful combatants. *See infra* p. 50.

defined) was "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id.* at 518.

Nine days after *Hamdi* was announced, the Deputy Secretary of Defense promulgated a far broader definition of "enemy combatant." The government now claims authority to subject to indefinite military imprisonment any individual falling within that definition, which includes anyone who is "part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners." Pet. App. 81a. This new definition does not appear in any act of Congress. It is not limited to people who have actually engaged in an armed conflict against the United States. Indeed, this definition of "combatant" includes citizens of friendly nations whose conduct does not approach any definition of "combat" or whose supposed "support[]" for al Qaeda is *unintentional*. *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 475 (noting the government's position that the military could indefinitely detain "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities" (internal quotation marks omitted)).

Petitioners' own case demonstrates the extreme breadth of the government's definition. They were not in or near any zone of armed conflict; they were not armed; they were taken into custody from their homes by the civilian police in Bosnia; and they were subject to a three-month investigation that concluded that there was insufficient evidence even to *detain* them further, let alone to prosecute them. The government's position that Petitioners are nonetheless detainable indefinitely as "combatants" oversteps any plausible reading of *Hamdi*.

The district court nonetheless held that the AUMF authorized Petitioners' detention. Pet. App. 59a. The govern-

ment urges the same conclusion, albeit for different reasons. *Cf.* Br. in Opp. 28. Both positions lack merit.[30]

1. **Contrary to the district court's conclusion, the AUMF is conditioned on a nexus to the September 11 attacks**

> The AUMF (§ 2(a)) authorized the President to
> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

The AUMF's authorization of force is expressly limited to nations, organizations, or persons "associated with the September 11, 2001, terrorist attacks." *Hamdi*, 542 U.S. at 518 (plurality opinion). Indeed, the President first requested broader authority to use force against persons unconnected with September 11 "'to deter and pre-empt any future acts of terrorism and aggression against the United States,'" but Congress refused.[31]

The district court misinterpreted the AUMF to authorize the use of force against "those who the military determined were *either* responsible for the 9/11 attacks *or* posed a threat of future terrorist attacks." Pet. App. 59a (emphasis added). That reading, which the government does not defend, cannot be reconciled with the AUMF's text or Congress's deliberate decision *not* to authorize force against targets unconnected

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[30] Petitioners may challenge their detention as unauthorized by law under the common law writ of habeas (codified at 28 U.S.C. § 2241(c)(1)) regardless of whether they can separately assert Fifth Amendment rights, although they can and do (*see infra* Part II.B). *See St. Cyr*, 533 U.S. at 302-303 ("[E]arly cases contain no suggestion that habeas relief in cases involving Executive detention was only available for constitutional error.").

[31] Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing the Use of Force Against International Terrorism*, 43 Harv. Int'l L.J. 71, 73 (2002).

with the September 11 attacks. *Cf.* Bradley & Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2108 (2005) ("If an individual had no connection to the September 11 attacks, then he is not covered as a 'person' under the AUMF even if he subsequently decides to commit terrorist acts against the United States.").[32]

2. Contrary to the government's assertion, the AUMF does not authorize detention of civilian citizens of friendly nations who have not directly participated in hostilities

The government argues that because the AUMF authorizes the use of force against "organizations" that "planned, authorized, committed, or aided" the September 11 attacks, it sanctions the indefinite military detention of anyone falling within the government's new and expansive definition of "enemy combatant." Br. in Opp. 28-29. That definition encompasses anyone who "support[s]" al Qaeda or its "associated forces." The AUMF's implied authorization to detain, however, does not extend to persons who could not properly be subjected to military force (including the imposition of detention) under the long-understood laws of war.[33]

Because the AUMF contains no express authorization for detention, any such authority must be inferred from the authorization to use "force." *Hamdi* set forth the principles by which any such inference must be guided. The Court concluded that military detention of "enemy combatants"—limited to persons actually engaging in hostilities against the

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[32] Moreover, since the government's definition of "enemy combatant" is not limited to persons who actually "pose[] a threat of future terrorist attacks," the district court's atextual interpretation of the AUMF would not justify Petitioners' detention under the standard that was actually used by their CSRTs to classify them as enemy combatants.

[33] The government has never asserted that Petitioners themselves "planned, authorized, committed, or aided" the September 11 attacks or "harbored" those who did. AUMF § 2(a). Nor is this a case involving "enemy aliens"—as the court of appeals recognized (Pet. App. 13a n.8)—because Petitioners are not citizens of a nation at war with the United States.

United States in Afghanistan as part of the Taliban—was "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized." 542 U.S. at 518. Critically, the Court rested its conclusion on "longstanding law-of-war principles." *Id.*; *see also id.* (military detention of enemy soldiers was recognized by "'universal agreement and practice'" (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942))). The course of the present conflict since *Hamdi* certainly distinguishes it in ways that complicate *application* of the laws of war in particular cases.[34] But as *Hamdi* reflects, the power to detain "combatants" inferred from the AUMF's authorization of "force" goes no further than the situations in which the laws of war themselves authorize military "force" (including military detention). *See, e.g.*, Bradley & Goldsmith, 118 Harv. L. Rev. at 2094 ("Since the international laws of war can inform the powers that Congress has implicitly granted to the President in the AUMF, they logically can inform the boundaries of such powers.").

The laws of war are particularly important in determining the scope of the AUMF's authorization of force against

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[34] Indeed, in Petitioners' situation—where they were taken from their homes by functioning civil authorities in a peaceful European country thousands of miles from any theater of armed conflict and rendered to the United States in violation of applicable law—it is unclear that the laws of war authorize military detention at all, *regardless* of the allegations against them. And there is no reason to believe that Congress, which used the terms "necessary and appropriate," intended to authorize any detentions that have *not* been traditionally authorized by the laws of war, much less to authorize a broad new category of indefinite military detention. *See* Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 Santa Clara L. Rev. 829, 838 n.51 (2005) ("[W]hen persons have been captured and detained outside the theater of war or a war-related occupation in Afghanistan or Iraq in circumstances where the laws of war do not apply, the expanded interpretation of the [AUMF] might be doubly doubtful. Additionally, the laws of war necessarily would not provide executive authority to detain a person to whom the laws of war do not apply."); *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866) (finding that laws of war did not justify military detention of civilian residing in "states which have upheld the authority of the government, and where the courts are open and their process unobstructed").

"organizations" responsible for September 11. Congress provided no express guidance for determining which *individuals* fall within that aspect of the force authorization. This omission is significant because "anybody can be suspected of complicity with al Qaeda," an organization that does not issue membership information. Ackerman, *The Emergency Constitution*, 113 Yale L.J. 1029, 1033 (2004). Given that the government seeks to imprison "enemy combatants" on the basis, for example, of "associat[ion] with" an organization with "ties to" the al Qaeda "organization" (CAJA 493), the "law-of-war criteria for combatancy" should "provide guidance on what type of association with al Qaeda suffices for inclusion within the 'organization' for purposes of the AUMF" (Bradley & Goldsmith, 118 Harv. L. Rev. at 2114).[35]

The laws of war justify extended military detention "to prevent a combatant's return to the battlefield." *Hamdi*, 542 U.S. at 519. "Indefinite detention for the purpose of interrogation is not authorized." *Id.* at 521. *Hamdi* rested on the fact that the laws of war authorize military detention of persons who join "'the military arm of the enemy government'" (*id.* at 519 (quoting *Quirin*, 312 U.S. at 37-38)) and who "'engage[] in an armed conflict against the United States'" (*id.* (quoting Gov't Br. 3)). Because Hamdi was allegedly such a person, he was a "combatant" who, notwithstanding his U.S. citizenship, could be the target of military force and could be detained as a "prisoner of war" to prevent his return to battle. *Id.* at 519 (quoting Winthrop, *Military Law and Precedents* 788 (2d ed. 1920)).[36]

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[35] The Court has relied on the international laws of war in resolving other matters of military authority. *See, e.g.*, *Quirin*, 317 U.S. at 35 (interpreting congressional Articles of War in accordance with a law of war principle that has "generally been accepted as valid by authorities on international law"); *Milligan*, 71 U.S. at 121-122 (concluding that "no usage of war could sanction a military trial ... of a citizen in civilian life, in nowise connected with the military service").

[36] *See also* Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(1), 6 U.S.T. 3316 (Third Geneva Convention) (defining "prisoners of war" as "[m]embers of the armed forces of a

Under the laws of war, individuals who—unlike Hamdi—are not affiliated with the armed forces of an enemy State are not "combatants," but "civilians."[37] The laws of war permit the use of military force against civilians, but only and for such time as they "take a direct part in hostilities."[38]

Although governmental analysis of the "direct participation" standard is not plentiful, important guidance exists. For example, the United States recently explained that it "understands the phrase 'direct part in hostilities' to mean immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the en-

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Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 43(2), 1125 U.N.T.S. 3 (Additional Protocol I) (defining "combatants" as "[m]embers of the armed forces of a Party to a conflict" other than medical and religious personnel); 1 Henckaerts & Doswald-Beck, *Customary International Humanitarian Law* 11 (2005).

[37] Additional Protocol I, art. 50 (defining "civilian" as any person who does not fall under identified sections of article 4 of the Third Geneva Convention or article 43 of Additional Protocol I).

[38] Department of the Navy, *Commander's Handbook on the Law of Naval Operations* 11.3 (1995) (U.S. Navy Handbook) ("Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy property lose their immunity and may be attacked."); U.S. Air Force Pamphlet 110-31, § 5-3(a)(1)(c) (Nov. 19, 1976) ("Civilians enjoy the protection afforded by law unless and for such time as they take a direct part in the hostilities."); *see also* Third Geneva Convention, art. 3(1) (prohibiting attacks on civilians "taking no active part in the hostilities"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 13(2)-(3), 1125 U.N.T.S. 609 (civilian population "shall not be the object of attack" "unless and for such time as they take a direct part in hostilities"); Bradley & Goldsmith, 118 Harv. L. Rev. at 2113-2114 ("The laws of war permit combatants to target other combatants, but prohibit them from targeting non-combatants unless the non-combatants take part in hostilities."); 1 Henckaerts & Doswald-Beck 19-20 (noting that State practice "establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts").

emy." Message from the President Transmitting Two Optional Protocols to the Convention on the Rights of the Child, S. Treaty Doc. No. 106-37, at VII (2000).[39] In a recent decision, the Supreme Court of Israel concluded that, under the laws of war, "a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it" satisfies the "direct participation in hostilities" standard and may be a lawful target of military force. *Public Comm. Against Torture in Isr.* v. *Israel*, 46 I.L.M. 375, 391 (Isr. S. Ct. 2007). The Israeli court concluded the opposite, however, for a person who "generally supports the hostilities against the army," who "sells food or medicine to unlawful combatants," or who "aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid." *Id.* at 392; *see also* Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi. J. Int'l L. 511, 535 n.93 (2005) (listing "cooking" and "providing personal legal advice" among "functions that would not constitute direct participation by civilians").

"Direct participation in hostilities" must be *intentional* in order for a civilian to become a lawful target of force.[40] And a civilian may only be targeted with force when and "for such time" as he engages in hostilities. U.S. Air Force Pamphlet 110-31, *supra* n. 38, § 5-3(a)(1)(c); 1 Henckaerts & Doswald-

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[39] The United States' requirement of a "direct causal relationship" follows the authoritative commentary on the Geneva Conventions. International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 516 (Sandoz et al. eds. 1987) ("Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.").

[40] *See, e.g.*, International Committee of the Red Cross 618 (describing direct participation as "acts which by their nature *and purpose* are *intended* to cause actual harm to the personnel and equipment of the armed forces" (emphasis added)); Schmitt, 5 Chi. J. Int'l L. at 538 ("[T]he mens rea of the civilian involved is the seminal factor in assessing whether an attack or other act against military personnel or military objects is direct participation.").

Beck, *supra* n. 36, 20-21. A single act of "direct participation" does not turn a civilian into a lawful target of force for all time. *Public Comm. Against Torture*, 46 I.L.M. at 393 ("[A] civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past.").

However, a civilian who repeatedly directs or otherwise takes part in hostilities may be considered to be continuously "participating" and therefore a legitimate target of force (and hence military detention). 46 I.L.M. at 393 ("[R]egarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.").[41] While this would certainly cover Osama Bin Laden—and conceivably others who have submitted themselves to the direction and control of an organization like al Qaeda—it would not come close to accommodating the government's capacious definition of "enemy combatant."

As noted, *Hamdi* emphasizes that military detention is justified only "to prevent *a combatant's* return to the battlefield." 542 U.S. at 519 (emphasis added). Civilians who do not directly participate were never on the "battlefield" in the first

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[41] That does *not* mean that a civilian can only lawfully be detained under circumstances when he could also lawfully be shot. Military force is subject to the principle of proportionality, meaning that even where a civilian is directly participating in hostilities, the laws of war do not authorize killing if arrest, interrogation, and trial would accomplish the same purpose. *See, e.g.*, U.S. Air Force Pamphlet 110-31, § 1-3(a)(2) (recognizing "the principle of humanity which forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes," which includes "a specific prohibition against unnecessary suffering" and "a requirement of proportionality"); 1 Henckaerts & Doswald-Beck 46-50 (similar). The AUMF itself (§ 2(a)) authorizes only the use of "necessary and appropriate" force. Therefore, there might be cases, such as in the specific circumstances of Hamdi's detention itself (*see* 542 U.S. at 513 (Hamdi detained when he "'surrender[ed] his Kalishnikov assault rifle'" to Alliance forces (quoting App.))), where the laws of war authorize detention but not targeting with lethal force.

place, and therefore there is no justification for treating them as "combatants" who might return. Of course, civilians may be *punished* for activity short of direct participation in hostilities, even though they cannot be targeted with military force or subjected to military detention. Congress can (and has) criminalized terrorist activities that fall below the threshold of "direct participation in hostilities." *See, e.g.*, 18 U.S.C. §§ 2339A (material support for terrorist acts), 2339B (material support to a foreign terrorist organization), 2339C (financing of terrorist acts); *cf.* 1 Henckaerts & Doswald-Beck, *supra* n. 36, 23 ("[I]nternational law does not prohibit States from adopting legislation that makes it a punishable offence for anyone to participate in hostilities, whether directly or indirectly.").

Like any legal standard, "direct participation in hostilities" is not free of ambiguity at the margins.[42] Military personnel engaging in the use of force must, and regularly do, make judgments about whether a particular civilian is directly participating in hostilities at a given time.[43] However, the standard is accepted and applied by the United States and allied nations, is recognized in treaties and customary international law, and is the subject of a large body of commentary and analysis.

By contrast, the government's new definition of "enemy combatant," as promulgated by the Deputy Secretary of Defense, is not based on any recognized law-of-war principle—and there is therefore no basis for assuming that Congress authorized it. The notion of "support[]" for al Qaeda is extremely malleable and is not grounded in any principles that could give it a reasonable compass. The laws of war do not treat as "combatants," and do not authorize the use of military

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[42] *See, e.g., Public Comm. Against Torture*, 46 I.L.M. at 392 (noting debate regarding "a person driving a truck carrying ammunition").

[43] *See* U.S. Navy Handbook 11.3 ("Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location and attire, and other information available at the time.").

force against, persons who "support[]" forces of a group such as al Qaeda but do not directly engage in hostilities themselves. Pet. App. 81a. In fact, the CSRT regulation labels as "combatants" persons who are clearly *not* lawful targets of force under the laws of war, such as civilians who (even unknowingly) provide "food or medicine" or "monetary aid" to al Qaeda. *Public Comm. Against Torture*, 46 I.L.M. at 392.

Congress may someday choose (within constitutional limits) to authorize detention or other treatment of civilians who do not meet the traditional law-of-war standard for detention. But the AUMF does not even purport to do so. Certainly it does not authorize indefinite military detention under the broad standard established by the Department of Defense.[44]

Accordingly, the government's return to the petitions for habeas corpus did not demonstrate a lawful basis for detention. No CSRT found that the Boumediene Petitioners directly participated in hostilities against the United States in a manner that would have justified the use of military force. The government should not be permitted yet another attempt to refashion the amorphous category of people it wishes to imprison indefinitely. It suffices that the government has held Petitioners for nearly six years without lawful authoriza-

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[44] Although this suffices to demonstrate that Petitioners' detention is unauthorized by law, the government's claim of authority would also fail on other grounds. First, it is far from clear that the laws of war authorize indefinite military detention of civilians under *any* circumstances (though they may be arrested and prosecuted if they engage in hostilities). *See generally* Br. of Amicus National Institute of Military Justice. Second, even if civilians who directly engaged in hostilities could be detainable at the time of original capture, the detention does not necessarily remain lawful several years later given the indefinite nature of the conflict at issue. *See Hamdi*, 542 U.S. at 520-521 (stating that the plurality's understanding of the AUMF might "unravel" if the conflict proved unlike prior conflicts); *see also supra* n. 34. The Court need not reach these issues in order to hold Petitioners' detention invalid because, as discussed in the main text, the AUMF's authorization of military detention of civilians (if any) extends at most to civilians who have been lawful targets of "force" because of direct participation in hostilities and who would otherwise "return" to battle at the direction and control of the enemy—a category far narrower than the government's definition of "enemy combatant."

tion. Petitioners are therefore entitled to immediate habeas relief: if not outright release, then at a minimum remand for a hearing to apply the correct legal standard to the government's existing return.[45]

B. Petitioners' Imprisonment Violates Due Process

Habeas relief is independently warranted because Petitioners' detention violates the Fifth Amendment. Petitioners' presence in a territory subject to the federal government's exclusive jurisdiction and control entitles them to the fundamental protections of the Due Process Clause. Due process requires, at a minimum, that their lengthy confinement be pursuant to fair procedures, including meaningful notice of the basis of detention and opportunity to be heard, representation by counsel, and a neutral decisionmaker. Although the *Hamdi* plurality suggested a procedural framework that might have satisfied due process had it been implemented in 2004, the government's CSRT process fell far short of even

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[45] The government has argued that Article II of the Constitution empowers the President to detain civilians even without congressional authorization. The Framers—who were notoriously suspicious of Executive detention—would not have silently given the President the power to subject individuals to military detention in a manner not authorized by either Congress or the laws of war. *See, e.g.*, *Loving* v. *United States*, 517 U.S. 748, 760 (1996) ("[T]he Framers harbored a deep distrust of executive military power and military tribunals."); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14 (1955) ("[A]ssertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law."); *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936) ("[T]he Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law."); *see also Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting) ("Except for the actual command of military forces, all authorization for their maintenance and all explicit authorization for their use is placed in the control of Congress under Article I, rather than the President under Article II."). Congress's refusal to grant the President's request for a broad authorization to use force (*see supra* p. 35) or to authorize force against civilians in circumstances not authorized by the laws of war shows that such a power is contrary to the express or implied will of Congress and therefore at the "lowest ebb" of Presidential authority. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637-638 (1952) (Jackson, J., concurring).

that approach. After nearly six years of unjustified imprisonment, the government's failure to comply with rudimentary due process deserves no further indulgence.

1. Petitioners possess fundamental due process rights under the Fifth Amendment

The district court summarily dismissed Petitioners' constitutional claims because it believed, based on *Eisentrager*, that Petitioners could not assert Fifth Amendment due process rights at all. Pet. App. 66a-67a.

Rasul determined that *Eisentrager*'s constitutional analysis does not apply to prisoners held indefinitely at Guantanamo. *See supra* Part I.A.2. The Court specifically envisioned that the district court would hold a hearing on Petitioners' due process challenges. *See* 542 U.S. at 483 n.15, 485 (stating that petitioners' allegations "unquestionably describe" violations of the Constitution, laws or treaties of the United States and remanding for the district court to consider "in the first instance the merits of petitioners' claims"). The district court's suggestion that *Rasul* was an empty gesture—recognizing only the "ability to file an application" that would be summarily dismissed under *Eisentrager* (Pet. App. 67a n.15)—is simply incorrect.

Petitioners' due process rights are further confirmed by *Rasul*'s reference to the "cases cited" in Justice Kennedy's concurrence in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 277-278 (1990). *Rasul*, 542 U.S. at 484 n.15. Chief among those cases were the *Insular Cases*, in which the Court rejected the broad argument (accepted by the district court and advanced by the government here) that aliens located in a "territory over which Congress has jurisdiction which is not a part of the 'United States'" cannot assert any fundamental Fifth Amendment rights. *Downes* v. *Bidwell*, 182 U.S. 244, 277 (1901). The Court noted that "certain natural rights enforced in the Constitution" would apply to aliens in such locations, including the right "to be protected in life, liberty, and property." *Id.* at 282-283; *see also Balzac* v. *Porto Rico*, 258 U.S. 298, 312-313 (1922) (noting that the "guaranties of certain fundamental personal rights declared in the Constitution,"

including "that no person could be deprived of life, liberty, or property without due process of law," applied in Puerto Rico, which merely "belonged" to the United States).

Justice Harlan's separate opinion in *Reid* v. *Covert* (also cited in Justice Kennedy's *Verdugo-Urquidez* concurrence) noted that the *Insular Cases* "stand for an important proposition," which is "of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place." 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result). The recognition of constitutional guarantees in other territories depends on "the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it." *Id.* at 75.[46]

Although *Verdugo-Urquidez* read *Eisentrager* as "reject[ing] the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States" (494 U.S. at 269), that statement was dictum, since *Verdugo-Urquidez* did not involve a Fifth Amendment claim, but rather a *Fourth Amendment* claim that the DEA should have obtained a search warrant prior to conducting a search in Mexico with the cooperation and permission of the Mexican authorities (*id.* at 262). Accordingly, the discussion in *Verdugo-Urquidez* cannot expand the holding or the reasoning of *Eisentrager*, which—as this Court recognized in *Rasul*—does not dispose of Petitioners' constitutional claims.[47]

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[46] Courts have accordingly held that aliens beyond the geographic boundaries of the United States may invoke specific constitutional rights. *See, e.g., Juda* v. *United States*, 6 Cl. Ct. 441, 455-458 (1984) (Marshall Islands); *Ralpho* v. *Bell*, 569 F.2d 607, 618-619 (D.C. Cir. 1977) (Trust Territory of Micronesia); *Government of the C.Z.* v. *Yanez P. (Pinto)*, 590 F.2d 1344, 1351 (5th Cir. 1979) (Canal Zone); *Government of the C.Z.* v. *Scott*, 502 F.2d 566, 568 (5th Cir. 1974) ("[I]t is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive."); *United States* v. *Husband R. (Roach)*, 453 F.2d 1054, 1058 (5th Cir. 1971) (same).

[47] *Verdugo-Urquidez* acknowledged that protracted detention could produce a connection to the United States sufficient to confer even Fourth Amendment rights. 494 U.S. at 271-272. Even if presence in Guantanamo were not enough, Petitioners' lengthy incarceration there creates a consti-

Justice Kennedy's *Verdugo-Urquidez* concurrence—widely and correctly viewed as the controlling opinion regarding the extraterritorial application of constitutional rights[48]—rested not on a theory that the Constitution could never apply extraterritorially, but rather on the fact that it would be "'impracticable and anomalous'" to apply the Fourth Amendment to searches in Mexico. 494 U.S. at 278 (citation omitted). As the Court in *Rasul* implicitly accepted, there is nothing "impracticable" or "anomalous" about insisting that the United States comply with the Fifth Amendment when it deliberately transports foreign citizens to, and incarcerates them indefinitely in, a territory where it exercises complete jurisdiction and control.[49]

2. Petitioners' indefinite detention without a fair hearing violates the Fifth Amendment

Due process requires that a serious deprivation of liberty—which potentially life-long military detention clearly is—be based on fair procedures that afford meaningful notice of the basis for detention and "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi*, 542 U.S. at 533 (plurality opinion); *see also Panetti* v. *Quarterman*, 127 S. Ct. 2842, 2856 (2007) (due process requires opportunity "to submit 'evidence and argument from the prisoner's counsel'" (quoting *Ford* v. *Wainwright*, 477 U.S. 399, 427 (1986) (Powell, J., concurring in part and concurring in the judgment))). Moreover, "the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Hamdi*, 542 U.S. at 533 (plurality opinion) (quoting *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972)

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tutionally cognizable connection to the United States.

[48] *See, e.g., United States* v. *Boynes*, 149 F.3d 208, 211 n.3 (3d Cir. 1998); *Lamont* v. *Woods*, 948 F.2d 825, 835 (2d Cir. 1991); Neuman, *Whose Constitution?*, 100 Yale L.J. 909, 972 (1991).

[49] *See, e.g.*, Fallon & Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2064 (2007) ("[A]liens detained at Guantánamo Bay possess at least 'fundamental' constitutional rights and thus a right to claim judicial redress for violations of those rights.").

(internal quotation marks omitted)). The Due Process Clause is particularly exacting where, as here, potentially lifelong confinement is contemplated without the protections that precede a criminal conviction. *See, e.g.*, *Foucha* v. *Louisiana*, 504 U.S. 71, 93 (1992) (Kennedy, J., dissenting) ("We have often subjected to heightened due process scrutiny, with regard to both purpose and duration, deprivations of physical liberty imposed before a [criminal] judgment is rendered[.]").[50]

As we have demonstrated (*supra* Part I.B.2), the government has failed to provide Petitioners with any hearing remotely approaching the basic due process requirements of meaningful notice and opportunity to be heard. The government's treatment of Petitioners is particularly unjustifiable given that, over three years ago, the *Hamdi* plurality described adversarial procedures for challenges to Executive detention of "enemy combatants" that might have complied with due process at that time. 542 U.S. at 538-539. The government did not follow this guidance. Instead, it promulgated rules that allowed it to avoid meaningful explication of the charges, prevented Petitioners from seeing most of the evidence used against them, forbade them from consulting counsel, and made it virtually impossible for them to identify and proffer favorable evidence. Those procedures are structurally

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[50] The requirements of due process mirror the procedures familiar to the common law (discussed *supra* Part I.B.1), as the Due Process Clause has long been understood to "affirm[] the right of trial according to the process and proceedings of the common law." 3 Story, *Commentaries on the Constitution of the United States* § 1783 (1833); *see also Robertson* v. *Baldwin*, 165 U.S. 275, 281 (1897) (aim of the Due Process Clause is "to embody certain guaranties and immunities which we had inherited from our English ancestors"); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1855) (due process inquiry "look[s] to those settled usages and modes of proceeding existing in the common and statute law of England"); *cf. Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting) ("The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property.").

flawed, and review under the DTA cannot cure them at this very late date. *See supra* Part I.A.2.[51]

The Court need not decide whether different procedures, if offered "'at a meaningful time and in a meaningful manner'" (*Fuentes*, 407 U.S. at 80 (citation omitted)), might satisfy due process in some future case. With Petitioners' unconstitutional imprisonment now approaching six years, no further procedural tinkering is justifiable. "It is not the habeas court's function to make illegal detention legal by supplying a process that the Government could have provided, but chose not to." *Hamdi*, 542 U.S. at 576 (Scalia, J., dissenting).

A comparison to the treatment of detainees in Israel—a democracy well acquainted with terrorist threats—demonstrates how far the government has strayed from the rule of law in this case. Israel requires that executive detention be reviewed by a judge within 48 hours and again every three months. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 Mich. L. Rev. 1906, 1920-1921 (2004). In the occupied territories, judicial review is required after eight days, and Israel's Supreme Court rejected a military effort to extend it to eighteen days; further reviews are required every six months. *See id.* at 1921-1922, 1927-1928 (discussing *Marab* v. *IDF Commander in the West Bank*, H.C. 3239/02, 57(2) P.D. 349 (Isr. S. Ct. 2003)). Even individuals held as "unlawful combatants" under a 2002 statute are entitled to judicial review after fourteen days of detention. *See* Incarceration of Unlawful Combatants Law, 5762-2002,

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[51] Whatever might have been viewed as tolerable in 2004 for Hamdi—an alleged soldier of an enemy State who supposedly waged war against the United States and had been detained for only two years—the different facts here should cause that "understanding [to] unravel." *Hamdi*, 542 U.S. at 521 (plurality opinion). Petitioners have been detained without charge for almost six years, not for waging war but based on the government's overbroad definition of "enemy combatant." The government's interests in continuing Petitioners' imprisonment forever without basic due process procedures are significantly weaker here than they were three years ago. "[A]s the period of detention stretches from months to years the case for continued detention to meet military exigencies becomes weaker." *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring in the judgment).

§ 5(a) (Isr.). Procedures on review in all cases include: (1) an independent judge; (2) representation by counsel; (3) a searching examination of the evidence; (4) the right to offer rebuttal evidence; (5) a court empowered to order release; (6) periodic independent reexamination at least every six months; and (7) two levels of plenary de novo appellate review. *See* Br. of Amici Specialists in Israeli Military Law and Constitutional Law. The United States Government's claim that national security or other interests make compliance with rudimentary due process requirements impossible or undesirable is untenable in light of the Israeli example.[52]

The lack of due process afforded Petitioners "unquestionably" gives rise to detention in violation of the Fifth Amendment. *Rasul*, 542 U.S. at 484 n.15. Because Petitioners are being detained "in violation of the Constitution (because without due process of law)," habeas relief should be granted. *Hamdi*, 542 U.S. at 576 (Scalia, J., dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with directions that the district court grant habeas relief, ordering Petitioners returned to Bosnia or, at a minimum, applying the correct legal standard to the government's return after a prompt hearing consistent with due process and common law habeas.

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[52] Similar protections are provided under European law. *See, e.g., Aksoy* v. *Turkey*, 23 Eur. H.R. Rep. 553 ¶ 62 (Eur. Ct. H.R. 1996) (detention of terrorism suspect for fourteen days without access to counsel or judicial hearing is unlawful even during an acknowledged "public emergency threatening the life of the nation"); *A & Others* v. *Secretary of State for the Home Dep't*, [2004] U.K.H.L. 56 (terrorism threat does not justify derogation of United Kingdom's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms to permit extended detention of foreign nationals without charge); *cf. id.* ¶ 74 (Lord Nicholls) ("Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law."); *see also* Br. of Amici Specialists in Israeli Military Law and Constitutional Law (collecting authorities).

Respectfully submitted.

STEPHEN H. OLESKEY
ROBERT C. KIRSCH
MARK C. FLEMING
JOSEPH J. MUELLER
PRATIK A. SHAH
LYNNE CAMPBELL SOUTTER
JEFFREY S. GLEASON
LAUREN G. BRUNSWICK
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
JONATHAN G. CEDARBAUM
MICHAEL J. GOTTLIEB
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 663-6000

DOUGLAS F. CURTIS
PAUL M. WINKE
ANNE K. SMALL
DAVID S. LESSER
JULIAN DAVIS MORTENSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

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